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Attorney for Plaintiffs
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**UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
(SAN FRANCISCO)**

ABRAR SIDDQUI an individual, RAHILA
KHAN, an individual
Plaintiffs,

vs.

CITY OF FREMONT, a municipal
corporation; CITY OF FREMONT
COMMUNITY DEVELOPMENT
DEPARTMENT; LEONARD POWELL in
his capacity as COMMUNITY
PRESERVATION MANAGER for CITY OF
FREMONT; and DOES 1-100, inclusive;
individually and in their capacities for CITY
OF FREMONT

Defendants

Case No.: 16-cv-02012-JSC

NOTICE OF MOTION AND MOTION
FOR RECONSIDERATION

DATE: October 31, 2016

TIME: 9:00 a.m.

Location: Courtroom F, 15th Floor

Hon. Jacqueline Scott Corley

TO DEFENDANTS, CITY OF FREMONT, a municipal corporation; CITY OF FREMONT
COMMUNITY DEVELOPMENT DEPARTMENT; LEONARD POWELL in his capacity as
COMMUNITY PRESERVATION MANAGER for CITY OF FREMONT; and DOES 1-100,
inclusive; individually and in their capacities for CITY OF FREMONT

1 that on October 31, 2016 at 9:00 a.m. or as soon thereafter as counsel may be heard by the
 2 above-entitled court, located at 450 Golden Gate Ave., San Francisco, California
 3 , in the courtroom of Judge Jacqueline Scott Corley, plaintiffs will and hereby do move the Court
 4 for a motion for reconsideration on the ground that plaintiff's counsel made errors that should
 5 not have affected the plaintiff's case in such a dire fashion. This motion is based on this Notice
 6 of Motion and Motion, the pleadings and papers filed herein and upon such other matters as may
 7 be presented to the Court at the time of the hearing.

8 9 **INTRODUCTION**

10 This is an action for damages brought pursuant to Title 42 U.S.C §§ 1983 and 1988, and
 11 the Fourth and Fourteenth Amendments to the United States Constitution, under California Civil
 12 Code § 52.1 and § 51.7, and under the common law of California. This action is against CITY
 13 OF FREMONT, and CITY OF FREMONT BUILDING INSPECTION DEPARTMENT. On
 14 September 8, 2016, the Court dismissed this case with prejudice for Plaintiffs' failure to
 15 prosecute and errors of Plaintiff's counsel. Because of the reasons stated below, Plaintiff's
 16 counsel requests that Plaintiffs case not be dismissed and that Plaintiff's counsel not be referred
 17 to the Standing Committee on Professional Conduct.

18 19 **Standard of Review**

20 "The Federal Rules of Civil Procedure do not recognize a 'motion to reconsider.' Instead
 21 the rules allow a litigant subject to an adverse judgment to file either a motion to alter or amend
 22 the judgment pursuant to Fed. R. Civ. P. 59(e) or a motion seeking relief from the judgment
 23 pursuant to Fed. R. Civ. P. 60(b)." Van Skiver v. United States, 952 F.2d 1241, 1243 (10th Cir.
 24 1991). Fed. R. Civ. P. 59(e) will govern when the motion for reconsideration is filed within ten
 25 days of the judgment and Fed. R. Civ. P. 60(b) will govern all other motions. Id. A motion for
 26 amendment under Rule 59(e) is limited to a narrow set of circumstances: it "is appropriate where
 27 the court has misapprehended the facts, a party's position, or the controlling law. . . . It is not
 28 appropriate to revisit issues already addressed or advance arguments that could have been raised

1 in prior briefing.” *Servants of the Paraclete v. Does*, 204 F.3d 1005, 1012 (10th Cir. 2000) (citing
 2 *Van Skiver*, 952 F.2d at 1243). “Grounds warranting a motion to reconsider include (1) an
 3 intervening change in the controlling law, (2) new evidence previously unavailable, and (3) the
 4 need to correct clear error or prevent manifest injustice.” *Id.* (citing *Brumark Corp. v. Samson*
 5 *Resources Corp.*, 57 F.3d 941, 948 (10th Cir. 1995)). This same standard has been applied to
 6 both Rule 59(e) motions, see *id.*; *Schlussler-Womak v. Chickasaw Tech Prod.*, 116 Fed. Appx.
 7 950 (10th Cir. 2004) (unpublished),¹ and Rule 60(b) motions, see *Lyons v. N.M. Dep’t of Corr.*,
 8 12 Fed. Appx. 772, 773 (10th Cir. 2001) (unpublished); *Adams v. Anderson*, 12 Fed. Appx. 910,
 9 914 (10th Cir. 2001)(unpublished).

Argument

Plaintiff’s Counsel Never Received Any Notifications of Filing Through The ECF of Pacer System

18 As stated in the Court’s order, Plaintiff’s counsel never received any notifications of
 19 Defendant’s filings and only learned of the Anti SLAPP motion subsequent to the deadline for
 20 the filing requirement. Counsel responded to the order to show cause with the opposition to
 21 motion to dismiss attached as an exhibit to the response. From the order, it appears that the
 22 opposition was never filed with the court. Counsel did not receive any notification as to the
 23 filing of the response to the order to show cause nor the opposition to the motion to dismiss until
 24 after August 29, 2016.

Plaintiff’s Counsel Did Not Learn That the Oppositions Had Not Been Filed and That The Anti-SLAPP Had Not Been Opposed Until After The August 29 Deadline

1 After the Court's two extensions of the deadline for filing the Opposition to Motion to
2 Dismiss, Order to Show Cause and Anti-Slapp, counsel regularly checked the court's docket, but
3 did not see that the oppositions had not been filed. Counsel routinely checks the court docket
4 from his cell phone, which may have led to the mistake. Plaintiff's counsel learned that the
5 oppositions had not been filed until the evening prior to the September 8, 2016 hearing at which
6 time he attempted to file the original opposition documents, but could not. When counsel
7 attempted to open the original documents and re-file them, the documents would not open.
8 Plaintiff's counsel spent the next 6 hours redrafting the documents as best he could. This led to
9 the filing of a partial document at 3:00 a.m.

10
11 **Plaintiff's Counsel Requested To Appear Courtcall for the September 8, 2016**
12 **Hearing But Was Too Late to Receive Court Approval**

13 Plaintiff's counsel has been practicing for 10 years and knows the importance of
14 appearing at hearings before the court. Prior to leaving his home on the morning of September 8,
15 counsel noticed that the traffic was unusually heavy, and his arrival time into San Francisco
16 would be at or near the start time for court. Counsel contacted courtcall and left for the
17 courthouse at 7:15 a.m., but was unable to appear court call and arrived at the Department at
18 9:11 a.m. at which time the exterior doors were locked. Plaintiff had been preparing to explain
19 to the court how unusual the errors had been in this case, with the filings and was prepared to
20 argue both the motion to dismiss and the anti-SLAPP motion.

21
22 **The Anti Slapp Motion and Argument Against Dismissal Became Increasingly**
23 **Difficult Without Additional Facts**

24 Because of the nature of the Anti-SLAPP motion, and that the Plaintiff would remain
25 liable for attorney's fees even subsequent to the dismissal, counsel was faced an untenable
26 situation. On September 6, 2016, counsel received additional information from Plaintiffs in
27 order to supplement the earlier filed opposition, which was not in fact filed. Counsel explained
28 to his clients the liability to them under the anti-SLAPP, and what would happen if the case was

1 dismissed and if their motion was successful. Counsel received several pages in opposition to
 2 the motion to dismiss and additional facts supporting the opposition, which counsel incorporated
 3 into the final document that was filed. The problem was that much of what was given by
 4 Plaintiffs was a reiteration of the complaint, or information that would not be helpful in
 5 overcoming a motion to dismiss or prevailing over an anti-SLAPP motion given the facts in this
 6 case. Subsequent to the filing of the anti-SLAPP motion, counsel should have discussed
 7 dismissal with opposing counsel and further with this because of the liability of the anti-SLAPP,
 8 and statute of limitations issues presented in the motion to dismiss.

10 CONCLUSION

11 Counsel has never had so many issues with filing or response to oppositions in his 10
 12 years of practice, and is embarrassed as to the effect this has had on this case. Although
 13 inexcusable, counsel would have timely responded had either the email notification or mail
 14 notification had apprised him of the non-filed documents. Counsel requests that the court take
 15 into consideration the continuous filing issues, the difficulty responding to the anti-SLAPP
 16 without liability to Plaintiff and his office move in reconsidering dismissal and referral to the bar
 17 and reconsider the order made on September 8th.

20 Dated: September 13, 2016

THE HILLIARD FIRM

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 23 BRIAN K. HILLIARD
 24 Attorneys for Plaintiffs ABRIR SIDDIQUI
 25 AND RAHILA KHAN
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